IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

NO. 78-1782

LAWRENCE E. BOWLING,
Petitioner,

V.

DAVID MATHEWS, et al.,
Respondents.

RESPONSE OF C. DALLAS SANDS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Sands, Respondent.

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STATEMENT OF ISSUES PRESENTED

As to this respondent (Sands)[1] the issues are:[2]

1. Is a distinguished teacher of law,

1 Reference herein to "respondent" is to Professor C. Dallas Sands, University of Alabama Law School.

2 There have been several appeal proceedings. A prior appeal by the petitioner is reported at 511 F.2d 112, and informs the Court of facts involved in and the nature of this prolonged proceeding.

who has long served the cause of academic freedom, subject to suit in damages because in a university faculty administrative proceeding--upon whose decision most reasonable men might differ--he voted in his capacity, as a trier, appointed without objection, to recommend dismissal of a faculty member provided one-year's severance pay be paid?

2. Did the Court of Appeals correctly affirm dismissal of a complaint in damages against a professor of law at the University of Alabama Law School,[3] who served on a faculty Hearing Committee[4] to hear charges against petitioner, a member of the faculty of another division of the University (College of Arts and Sciences); who was deliberately not challenged for cause by petitioner on advice of petitioner's counsel; who duly heard the evidence; and who concluded that petitioner represented a significant obstacle to the effective functioning of petitioner's University Department; but who recommended that it would not

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[3] This dismissal was not ordered upon mere bare bones pleading. All the facts related to respondent were before the district court in voluminous pleadings and in the extensive record of the administrative hearing.

[4] There were eventually a second committee and a second hearing in which this respondent was not involved.

be inappropriate for the University to dismiss petitioner without giving him terminal leave with pay for a period of one year?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner seeks review of an order dismissing a complaint against respondent Professor C. Dallas Sands, a member of a five-man faculty Hearing Committee of the University of Alabama. The Committee heard charges against petitioner. Petitioner disagrees with the vote cast by respondent as a member of the Committee. Although represented by counsel and given the right to challenge members of the Committee for cause, petitioner on advice of counsel (R.39)[5] declined to exercise that option and thereby consented to respondent's sitting.

Respondent, as a member of the administrative Hearing Committee, wrote an opinion of recommendation. Petitioner himself has described that opinion as "strongly favorable to ... [petitioner], except for the penultimate paragraph" (Brief for Plaintiff-Appellant in 5th Cir., at 32-33 in Case No. 74-1309; see, also, R. 13).

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[5] "R" indicates pagination of the original record in Case No. 76-2949, CCA 5.

In petitioner's own terms, respondent is "an authority on academic freedom" (Brief, supra, at 8). Fellow faculty members who disagreed with respondent's conclusion as a member of the Committee, and whose views as "observers" of the administrative proceeding are relied upon by petitioner, have nevertheless pointedly stated that such a conclusion was one upon which "reasonable men may differ" (R. 80).[6]

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[6] Even the observers of the American Association of University Professors, who are inclined to side with petitioner in his dispute with the University (R.80) had this to say:

"As 'observers' we find ourselves in the embarrassing and unhappy position of disagreeing with our own distinguished chapter president, respected leader and colleague, Dallas Sands, who sat on the hearing board and who voted to sustain the discharge of Dr. Bowling. Had he 'dissented' we, of course, would have underscored his 'dissent' as reinforcing our own judgment in the matter of academic freedom and tenure. Now that we find ourselves on the other side of the fence in this particular case, and in the posture of appealing for most careful inquiry by the AAUP national office, we simply make note of the fact that reasonable men may disagree on such issues in specific circumstances. Professor Sands is one to whom we run when questions of academic freedom and tenure arise (and we shall continue to do so)." (emph.supp.)

The vote of the Hearing Committee, after an extensive administrative hearing in which petitioner was ably represented by counsel, was four to one to recommend dismissal (R. 73). Thereafter, petitioner was dismissed by the University. Respondent did not participate in the actual order of dismissal.

Petitioner did not sue the member of the Committee who voted in favor of petitioner and against recommendation of dismissal.

The order of the district court that required a second administrative hearing (under the procedural strictures of Ferguson v. Thomas, 430 F. 2d 852) expressly found "no personal reflection on the individual members of the Committee" (R.383).

While disagreeing with the vote rendered by this respondent as a member of the majority of the Committee, petitioner accepted the severance pay of one year which respondent had recommended.

The Court of Appeals affirmed the action of the district court in dismissing respondent.

ARGUMENT

I. Respondent Is Immune From Suit Under The Doctrine Of Quasi-Judicial Immunity

Petitioner challenged only the vote respondent cast.

His complaint simply charges respondent with having participated as a trier in an administrative hearing and having thereafter joined in a majority decision unfavorable to petitioner. It is crystal clear that the complaint seeks damages of respondent solely because of respondent's vote: the one member of the Hearing Committee who participated precisely as did this respondent in the conduct of the hearing, but who dissented without opinion in petitioner's favor, was not made a defendant.

He who sits as a trier is not subject to suit simply because of the manner in which he conscientiously votes on the issue before him.

In his capacity as a member of the Hearing Committee respondent was protected by the doctrine of quasi-judicial immunity and his dismissal was therefore correctly ordered. Cf. e.g., Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962), citing Wilder v. Crook, 250 Ala. 424.[7]

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7 The traditional immunity of a trier of fact is the linchpin of fair hearing procedures. See Skehan v. Board of Trustees of Bloomsburg St. College, 538 F.2d 53 (3rd Cir. 1976), affirming

II. Petitioner's Right, If Any, To Object To Respondent's Sitting On The Committee Was Knowingly Waived Upon Advice Of Counsel

Respondent did nothing to invade petitioner's rights by sitting on the Committee. Were the opposite true, petitioner's position would be no better. For procedural rights embodied in due process are subject to waiver that is voluntary, knowingly and intelligently made, particularly when, as here, the relinquishment occurs with advice of competent counsel. D. H. Overmyer Co.Inc. of Ohio v. Frick Co., 405 U.S. 174, 92 S.Ct. 775.

That occurred. And, as matters proved out, petitioner's counsel's advice was sound. Petitioner was eventually the beneficiary of the generous and humane recommendation of this respondent that petitioner be discharged only if one year's severance pay were provided. Petitioner received that severance pay.[8]

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7 (cont'd) "that the common law unqualified immunity of judicial officers remains undisturbed," at 62, citing Imbler v. Pachtman, 424 U.S. 409, which recognized the time-honored immunity of those whose activities are an integral part of the judicial process.

8 Comparably, one who accepts benefits under a judgment cannot attack that judgment by appeal. 4 Am.Jur. 2d § 250.

III. The Findings Below

Denial of the petition need not reach beyond the dispositive doctrine of quasi-judicial immunity and waiver. But petitioner does not fail merely for lack of an acceptable theory for his case.

The district court, demonstrably sensitive to petitioner's procedural rights, carefully found that no impropriety can be charged to individual members of the Hearing Committee (R. 383).[9] And the Court of Appeals has affirmed.

Nothing in the present case would justify review of the concurrent findings by the two courts below. See Berenyi v. District Director, Imm. & Nat. Service, 385 U.S. 630, 635.

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9 Of course, the district court also ultimately found petitioner subject to discharge after a second administrative hearing. Respondent was by then long out of the proceeding.

CONCLUSION

This esteemed teacher and defender of academic freedom was correctly relieved by the courts below of the burden of further proceedings in this cause. Not to have done so, merely because petitioner disagreed with the result reached by respondent as a trier, would in a real sense have threatened the integrity of the very system of free and independent inquiry that is essential in such circumstances as the present.

Due process is a keystone of those values which the western world cherishes. Petitioner has enjoyed that protection to the very fullest. He has lost. And he has shown not the slightest error in the decision below.

Nor has petitioner established any conflict between that result and governing constitutional or decisional law.

Respondent submits that there is no reason to grant the petition and it should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing Response have been served by mailing, postage prepaid, this 19 day of July, 1979, to the following:

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